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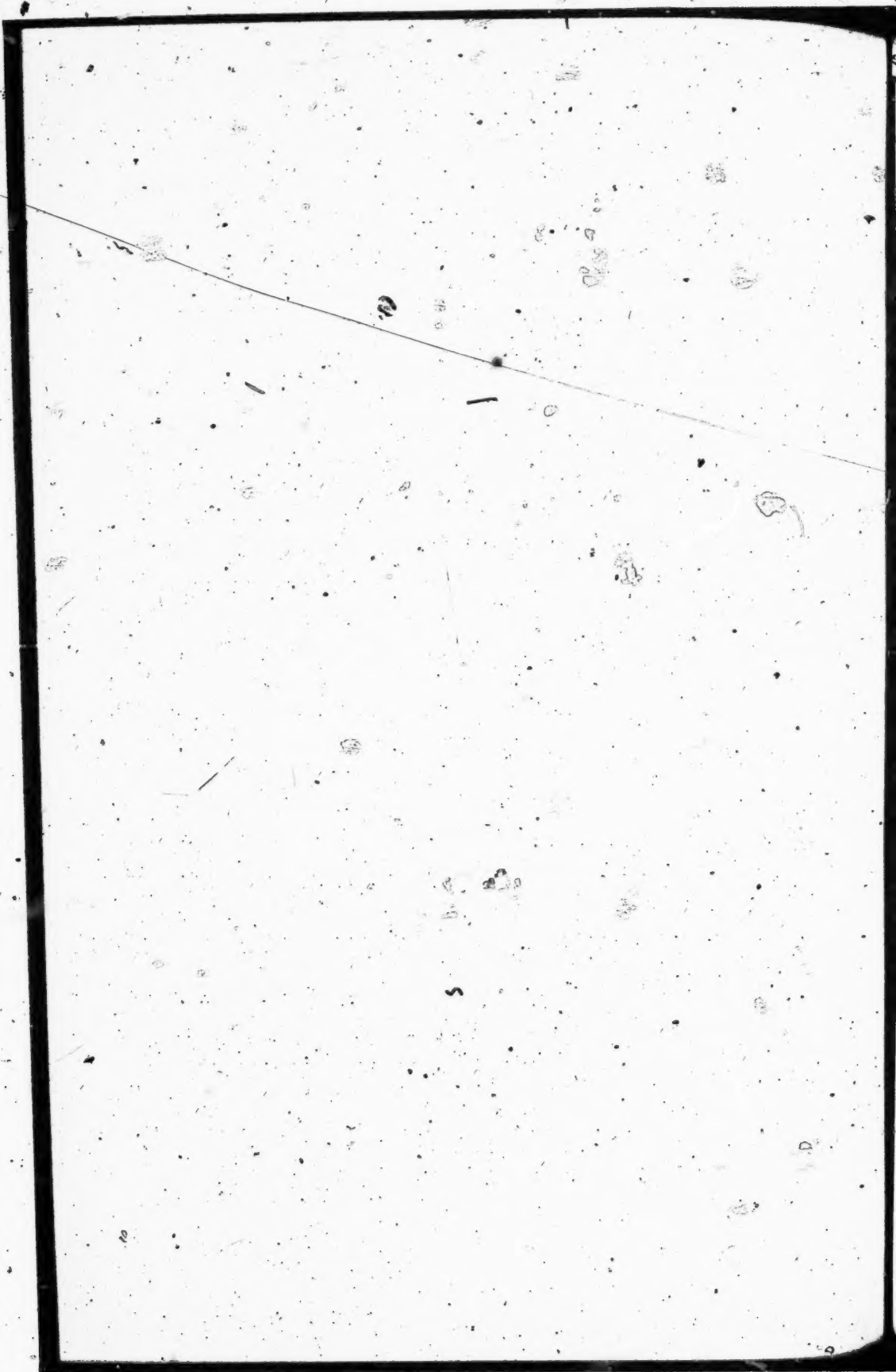

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 4

KRAUSS BROS. LUMBER COMPANY, a corporation,
Petitioner,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the Steamship PACIFIC CEDAR, her engines, tackle, apparel, etc.
Respondent.

BRIEF OF RESPONDENT

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT

This case involves a point of admiralty jurisdiction in rem raised upon exceptions to the libel sustained by the lower court (R. 25, 26). The facts therefore are all contained in the libel (R. 3) and Exhibit "A" attached thereto (R. 9). These facts are relatively simple. Taking the allegations of the libel as admitted for the purpose of considering exceptions thereto, the facts appear as follows:

On November 22, 1929, libelant, Krauss Bros. Lumber Company, a corporation, and respondent, Dimon Steamship Company, a corporation, entered into a contract of carriage for certain cargo of lumber from Puget Sound and Grays Harbor ports to Philadelphia and New York at the agreed rate of "$10.00 per M feet net measurement" (R. 9). The contract also provided: "8. Upon the cargo being loaded on the vessel, it shall be carried subject to the terms, exceptions and conditions of the carrier's regular bill of lading which shipper agrees to accept and be bound by" (R. 11).

The cargo was loaded on respondent's steamship PACIFIC CEDAR and carried to destination as required under the contract "at the ports of New York, Philadelphia and Baltimore between the 1st and 20th day of March, 1930, and that between the 1st and 20th days of March, 1930, at New York City, New York, the respondent, Dimon Steamship Company, a corporation, and respondent Steamship PACIFIC CEDAR demanded, received and collected from libelant the sum of $14,657.30, the freight on the aforementioned shipment at the rate

of $10.00 per M feet" (R. 5, 6). It is then alleged that in the month of January, 1930, a regular inter-coastal carrier, the Luckenback Steamship Company, carried similar cargo from Seattle to Boston at the rate of $8.50 per M feet, and that by reason of a clause contain in the contract of carriage to the effect that if a regular inter-coastal carrier carried similar cargo at a lower rate, such lower rate would be applied (R. 9) there is now due and owing to libelant the difference between $10.00 per M feet paid and $8.50 per M feet charged by another regular inter-coastal carrier. It is further alleged that "before the commencement of this proceeding" libelant demanded the sum alleged to be due, which demand was then refused (R. 6).

The respondent in this action, in establishing its position herein, relies upon an interpretation of these facts in the following respects which are material to the decision:

1. The contract of carriage (Exhibit "A") is one between libelant and respondent, Dimon Steamship Corporation, executed several months prior to undertaking the carriage of cargo therein referred to. The contract specificially provides the cargo is to be carried when loaded on the vessel subject to the terms, exceptions and conditions of the carrier's bill of lading. (R. 11). This contract, therefore (Exhibit "A") is not the contract under which the respondent Steamship PACIFIC CEDAR actually carried the cargo.

2. The contract (Exhibit "A") expressly provides for freight at the rate of $10.00 per M feet net measurement. The clause providing for a lesser rate on contingency is

an independent undertaking. It is contained under the heading of "remarks" (R. 9) along with other independent clauses in the contract. In this respect it is in the nature of a rebate; calling for a fixed rate of freight with a right to rebate on a named contingency. While it is not alleged by the libel, we must assume that the rate of freight provided in the bill of lading was a fixed sum, probably $10.00 per M feet.

3. The libel does not allege that the freight of $10.00 per M feet was wrongfully or unlawfully exacted, or that it was paid under protest or as a condition precedent to delivery. We must, therefore, contend that the facts show a voluntary payment by libelant according to the contract rate.

4. The libel does not allege that either party knew of the alleged fact that another regular carrier had carried similar cargo at a lower rate at the time freight was paid at destination, at $10.00 per M feet. It necessarily follows that the deduction most favorable to the libelant from this allegation is that the freight was voluntarily paid by mutual mistake of facts, or that libelant having knowledge of the happening of the contingency made a voluntary payment intending to secure a rebate from respondent Dimon Steamship Corporation.

5. The libel does not allege any fault or breach by the respondent steamship PACIFIC CEDAR in its performance of the Act of Transportation, having to do with the loading, carriage and delivery of cargo or otherwise. The only manner in which the respondent vessel is connected with the libel is the allegation that the owner and the vessel collected the freight at destination at the rate of

$10.00 per M feet. In this respect there is no allegation as to the vessel's undertaking, or that the vessel was in default in any respect.

6. The proof necessary to sustain the libel necessarily must be that the Luckenback Steamship Company carried similar cargo at the rate of $8.50 per M feet. This fact is the very basis of libelant's right of recovery. It is unrelated to the performance of any obligation of carriage by the vessel.

7. The libel contains no allegation as to when the libelant discovered the fact of carriage by Luckenback Steamship Company at a lower rate. It is not alleged that the respondent, Dimon Steamship Corporation or the respondent Steamship PACIFIC CEDAR had any knowledge of this fact at any time. The allegation is merely that "prior to the commencement" of the action, demand was made. The action was started more than fourteen months after payment of the freight.

ARGUMENT

No decision of this court or other courts has dealt with this precise question. Petitioner has cited none, and we are unable to cite definite precedent on the question presented on the particular facts involved. Respondent's position is, however, strongly supported by analogy and reasoning of existing decisions. The very nature of a maritime lien and the development of precedent denies the right of lien in this case.

I

A Breach or Violation of a Contract of Affreightment Does Not Always Give Rise to a Maritime Lien

A. *This court has frequently held that a breach of a contract of affreightment which is wholly executory does not give rise to a maritime lien.*

The Keokuk, 9 Wall. 517; 19 L. Ed. 744 (1870);

The Freeman v. Buckingham, 18 How. 182, 59 U. S. 182 (1855);

The Lady Franklin, 8 Wall. 325, 75 U. S. 325 (1868).

In the *Keokuk*, 9 Wall. 517, the court said:

> "It is a principal of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain *by the fault of the vessel or the master*, but the law creates no lien on a vessel as security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made and the cargo to which it relates has been delivered to the custody of the master or someone authorized to receive it.
>
> * * *
>
> "* * * and if it be the corporation is somewhat to blame for this, the steamer has not on that account committed any fault for which she is chargeable in admiralty, as no one in her behalf contracted with the libelant to transport the barge. * * * And he did nothing to transfer its possession to the steamer. The libel cannot be sustained."

B. *That the contract is partially executed gives no right of lien for failure to fully execute the contract.*

O. S. K. v. Pacific Export Lumber Co., 260 U. S. 490; 67 L. Ed. 364 (1923);

S. L. Watson, 118 Fed. 945 (C. C. A. 2), (1902).

In the case of *O. S. K. v. Pacific Export Lumber Company*, supra, the ship had undertaken to load and had loaded part of the cargo covered by the affreightment contract, but refused to load all of the cargo. Libelant claimed part performance of the contract gave rise to the right of a maritime lien for breach of the contract. The court said:

> "The theory that partial acceptance of designated cargo under a contract of affreightment creates a privilege or lien on the ship for damages resulting from a failure to take all, is inconsistent with the opinions of this court and we think without support of adequate authority." (Citing the *S. L. Watson*, 118 Fed. 945, 952).

C. *A breach of contract of affreightment gives no right of lien where the breach occurs with respect to matters done or omitted prior to the loading of cargo, even though the contract thereafter becomes fully executed by loading, carriage and delivery of all of the cargo.*

The Saturnus, 250 Fed. 407 (C. C. A. 2);
The Ask, 196 Fed. 165 (D. C.);
The General Sheridan, Fed. Cas. No. 5319 (D. C. N. Y.).

In *The Saturnus*, supra, the court considered this question: "Is a maritime lien upon hull or cargo, as the case may be, the normal and lawful result of every legal claim for damage due to any violation of the terms, express or implied, of a contract of carriage under which a carriage is ever actually begun?"

The facts of the case were that the shipper had incurred extra expense for moving his cargo from one berth to another made necessary by the refusal of the

shipowner to load at the designated berth. The cargo was thereafter loaded, carried and discharged at destination. A libel in rem was filed to recover the expenses incurred by the shipper by reason of the breach of contract to load at the berth designated therein. The court held no lien existed as the breach occurred before reciprocal rights between ship and cargo came into existence and the later existence of the relation did not by loading and carriage give right to a maritime lien.

> "To make lien depend on its relation to a point of time, i. e., the date of delivery to ship is perhaps fictional or mechanical rather than thoughtful, yet for lack of a better line of demarcation has long been well known in matters of statutory liens of mechanics and others.
>
> "In *The Ask* (D. C.), 196 Fed. 165, ship's alleged wrongful delay caused waiting cargo to spoil and after lading a lien was asserted for antecedent damages. The delay was adjudged excusable, but McPherson, J. pointed out that any lien came into existence 'at the time the injury was done.' The necessary inference being that as nothing was laden at date of injury, there was nothing to which the lien could then attach, and there certainly cannot be a lien in Nubibus waiting to descend."

II

The Maritime Lien or Privilege is a Matter of Strict Right, a Jus in Re Accompanying the Property into the Hands of Bona Fide Purchasers and Operating to the Prejudice of General Creditors, and is Therefore Stricti Juris and Not to be Extended Argumentatively or by Analogy or Inference

The Lady Franklin, 8 Wall. 325, 75 U. S. 325 (1868);

The Maggie Hammond, 9 Wall. 435, 76 U. S. 435 (1869);

The Keokuk, 9 Wall. 517, 19 L. Ed. 744 (1870);

The Freeman v. Buckingham, 18 How. 182, 59 U. S. 182 (1855);

Vandewater v. Mills, 19 How. 82, 15 L. Ed. 554 (1857);

O. S. K. v. Pacific Export Lumber Company, 260 U. S. 490, 67 L. Ed. 364 (1923);

The S. L. Watson, 118 Fed. 945 (C. C. A. 2) (1902);

The Saturnus, 250 Fed. 407 (C. C. A. 2) (1918);

The G. A. Tomlinson, 279 Fed. 786 (D. C. N. Y. 1922).

The following language of this court in *Vandewater v. Mills* (The Yankee Blade), 19 How. 82, by Mr. Justice Grier, is all inclusive of the rule and was quoted by this court in the case of *O. S. K. v. Pacific Export Lumber Company*, 260 U. S. 490:

> " 'The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and devested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore 'stricti juris,' and cannot be extended by construction, analogy, or inference. 'Analogy' says Pardessus (Droit Civ. vol. 3, 597), 'cannot afford a decisive argument, because privileges are of *strict right*. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.'
>
> * * *

" 'Now, *it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance.* This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligee a la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter party, its convenants will define the duties imposed on the ship. Hence it is said (1 Valin, Ordon, de Mar. b. 3, title 1, art. 11) that 'the ship, with her tackle the freight, and the cargo, are respectively bound (affectee) by the covenants of the charter party.' *But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration.* If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the nondelivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases.

* * *

" 'And this court has decided, in the case of *The Freeman v. Buckingham*, 18 How. 188, 15 L. Ed. 343, 'that the law creates no lien on a vessel as a security for the performance of a contract to trans-

port cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.'"

III

The Facts of the Present Case, When Tested by the Law Applicable to Maritime Liens, Do Not Give Rise to a Lien on the Respondent Vessel in Favor of the Libelant

The maritime lien does not arise from a mere breach of contract of affreightment, but must arise out of the Act of Transportation. The lien is reciprocal and mutual in that the ship is bound to the cargo and the cargo to the ship. And no lien may arise under a contract of affreightment until the cargo is loaded or in the possession of the master or the vessel, at which time the mutual obligations arise. These obligations are that of the ship to safely carry and deliver and the obligation of the cargo for the payment of freight. In this respect the vessel is personified in the law and the breach must be one done or omitted by the vessel as such in its relation to the cargo. A fault or breach having no relation to the act of transportation by the vessel, such as one committed by the owner, gives no right against the vessel. This lien being a jus in re adheres to the property into the hands of bona fide purchasers without notice; it is a secret lien and a matter of strict right. The lien must be given by the law itself and cannot be extended argumentatively by analogy or inference. It is stricti juris and if not well defined in the law should not be allowed.

The application of these principles to the facts of the case now before the court presents a problem requiring careful analysis. Many cases exist which inferentially

substantiate the lien in this case. These, when carefully analyzed, are clearly distinguishable. We attempt, in the remaining part of this brief, to analyze these decisions on the basis of the general principles heretofore set forth.

A. *No fault of the respondent vessel in relation to performance of the Act of Transport or at all, is involved, and no lien exists.*

The briefs heretofore filed in this case tend somewhat to confusion because of the lack of a precise statement of contention. The many cases cited by petitioner are of little value to the court except when analyzed, to illustrate the distinction. None of them are in point on the facts and all can be distinguished upon one ground or another. There is some loose language in some of the decisions and in others the point of jurisdiction was not raised.

(*1*) ***Respondents position is this:***

There is in this case no allegation in the libel, or a reasonable inference therefrom, of any fault, act, breach, omission or occurrence of any nature done or omitted by the respondent vessel PACIFIC CEDAR which could possibly be the basis of a maritime lien upon the vessel. After a cargo is loaded and reciprocal rights between the ship and cargo exist, the obligation of the ship is for proper stowage, care and handling of the cargo and delivery of the same at the time and place designated in the contract of affreightment or bill of lading. The obligation of the cargo is to pay freight. All of this was fully accomplished in this case. It has been said that the obligation to which the ship is hypothecated extends to a "right delivery of cargo." The use of the word "obliga-

tion" does not refer to a point of time, but to the fulfillment of those things which the ship is obliged to do. This is referred to in some decisions as the "Act of Transportation," and when, as in this case, the act of transportation is fulfilled as to all obligations coming thereunder, no lien exists against the vessel on account of matters occurring outside the scope of such undertaking.

A test to be applied in each case is the nature of the proof necessary to sustain the libel. If the proof be that the ship or its master failed in some obligation to the cargo in respect to the act of transportation, then a lien exists for such breach. If, on the other hand, the proof be that the owner failed in some respects or as in the case now before the court that a third party did an act which gives rise to the claim, no lien exists. In the present case the proof at the time of trial would necessarily be that another intercoastal carrier carried similar cargo at $8.50 per M feet. This is the very basis of libelant's cause of action. It has no relation to the respondent Steamship PACIFIC CEDAR or any undertaking to which the vessel was hypothecated. The fact that the agreement for a rebate is contained in a contract of affreightment is immaterial as a lien is not necessarily the normal result of all breaches of such contract.

(2) *The following cases, many of which are relied upon by petitioner, when analyzed are found to be in thorough accord with the law as contended for by respondent.*

The G. A. Tomlinson, 279 Fed. 786 (D. C., W. D. N. Y.):

This case was a libel in rem by a shipper to recover freight. The facts were that the ship undertook in a bill of lading to deliver the cargo at a designated place. The ship did not unload at the place named, but at another and different place, where freight was demanded by the ship as a condition precedent to delivery of the cargo. The freight was paid under protest by the shipper. The lien was upheld by the court upon exceptions to the libel.

The court said that:

> "* * * the lien must arise from the 'Act of Transportation' such as improper stowage, breakage, pilfering, or something of that nature, but such lien also extends to right delivery. * * * A term that in my opinion is not limited to safe and sound delivery but one that impliedly includes right delivery at the place designated by the shipper."

In this decision the idea of the necessity of the personified ship committing or failing in some act or obligation is forcefully discussed and considered. The idea of a wrongful act by the ship as such in the nature of a tort, although it may also be breach of contract, is the distinction respondent is now contending for. The court said:

> "If I am right in holding the relations were creative of a maritime lien it may be that the freight paid is recoverable on the theory that it was *wrongfully exacted.*" (Italics ours).

The Keokuk, 9 Wall. 517:

While this case is most frequently cited as authority for the proposition that no lien exists for breach of an executory contract of affreightment, the language of the court lends further support to our contention.

The facts were that libelant had unknown to the shipowner loaded one of the latter's barges with a cargo of grain. When the "Keokuk" arrived in port at midnight, and during a storm, libelant handed papers which were later found to be bills of lading, to an officer of the boat then busily engaged in checking cargo. It was not made clear to him what the papers were and the "Keokuk" left port without the barge. The barge remained unattended during the night and sank.

> "It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain *by the fault of the vessel or the master.* * * * The steamer has not on that account committed any fault for which she is chargeable in admiralty." (Italics ours).

The idea of the necessity of a fault on the part of the ship is here expressed by this court. If a fault or omission in some respects be necessary on the part of the ship to create a maritime lien, and therefore no lien can exist where the vessel has not taken possession of the cargo, then certainly the same faults or omissions are necessary after it has taken possession of the cargo in order to create a lien upon the vessel.

The Freeman v. Buckingham, 18 How. 182:

The master of the ship was appointed by the charterer (owner pro hac vice). He issued bills of lading for flour never received on board the vessel. The bills of lading were fraudulent. Libelants were consignees named in the bills of lading who did not receive the flour.

This court held that there was no maritime lien on the vessel, aside from the ground of no cargo having been loaded, on the further ground that the fraudulent acts of

the master were not attributable to the owner as he, the master, was agent of the special owner.

> "There can be no implication that the general owner consented that false pretenses of contracts having the semblance of bills of lading should be created as instruments of fraud or that if so created they should in any manner affect him or his property. They do not grow out of any employment of the vessel and there is as little privity or connection between him or his vessel and such simulated bills of lading as there would be between him and any other fraud or forgery which the master or special owner might commit."

While more remote, the same idea of fault or wrong by the vessel or its master necessary for a maritime lien to exist is here expressed.

It is well to note at this point that a distinction must be made between cases where the maritime lien is denied by reason of failure of the relation of ship and cargo and those where the cargo is loaded and carried and the ship commits some breach.

In the former case it is held that no lien exists even though the ship or master commits a breach. In the latter instance no case has ever been decided where a lien was allowed without a fault of the ship or master in respect to the obligations which are a part of the Act of Transportation.

It was so stated in *The Saturnus*, 250 F. 407, 411:

> "There can, we think, be no doubt that never was a privilege properly awarded for an expense put on a shipper and not caused by physical damage to goods actually carried *and by the act of transport.*"

In *O. S. K. v. Pacific Export Lumber Co.*, 260 U. S. 490, the decision states:

> "Having taken on a full underdeck cargo and 241,559 feet upon the deck, the captain refused to accept more."

This was a wrongful act of the master in respect to the obligation of the vessel and yet this court, holding to the strict application of maritime liens, held that no lien existed for this plain breach. The reason for denying a lien in the *O. S. K. v. Pacific Export Lumber Co.* case, supra, following the language of the *S. L. Watson*, 118 F. 945, 952, is much less forceful than in the case now before the court. In our present case no wrongful act or breach of the Act of Transportation existed. There was no "visible occurrence relating to the vessel or the cargo" to give rise to any lien.

The Muskegon, 10 Fed. (2) 817 (D. C. S. D. N. Y.):

Here the libel was to recover duplicate freight on prepaid cargo demanded by the master as a condition precedent to delivery. In order to obtain delivery of the cargo freight was therefore paid under protest. In refusing to deliver the cargo the ship was liable for failure to make a right delivery.

> "It is for the failure and refusal of the steamship *Muskegon* to deliver the cargo in accordance with the bills of lading to the consignee that libelant brings suit."

The lien was allowed in this case, but here again the court adheres to the idea of the necessity of a fault of the ship in respect to the Act of Transportation. This case is cited by petitioner as authority for its position. It is clearly distinguishable and well illustrates the distinction existing in the cases.

The General Sheridan, Fed. Case No. 5319 (D. C. S. D. N. Y.):

"Any duty that may be violated by the owner or master before the cargo is put on board is not a duty of the vessel or one for the breach of which a lien on the vessel is created or can be enforced. So, too, under the covenant if the cargo is not laden on board it is not bound to the vessel and therefore the vessel cannot be in default though the master or owner may be for the nondelivery of the cargo."

The S. L. Watson, 118 Fed. 945 (C. C. A. 2);

The Thomas P. Sheldon, 113 Fed. 779 (D. C. R. I.):

These two cases are the same; one being in the district court and the other the Circuit Court of Appeals for the 2nd Circuit. Both cases are of value in connection with the present case, first, because this court expressly approved the *S. L. Watson* in *O. S. K. v. Pacific Export Lumber Company*, 260 U. S. 490, and second, because the language used by the courts in the decisions lends definite support to respondent's position here.

The facts of these cases are not in point. The question was whether a charterer had a maritime lien on various barges for failure of the owner to make more than one voyage when the undertaking was that both barges would complete five voyages. One barge completed one voyage, but no further performance was had. On these facts the court held that there was no maritime lien, even though one barge had undertaken and entered upon the performance of the contract of affreightment by making one voyage. In arriving at this conclusion, and in stating the reasons why no maritime lien existed, the court expressed and followed general propositions of admiralty law which apply to support respondent's position here.

"The charter or affreightment contract itself creates no lien. The lien arises only when cargo has been loaded on board and it makes no difference that part of the contract has been executed. Courts have held that where the contract remains wholly executory, that no lien is created by its breach, or until some cargo is loaded and reciprocal rights exist. (*The Freeman v. Buckingham*, 18 How. 182; *The Keokuk*, 9 Wall. 517).

"The vessels * * * so far as voyages not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implications, but they well and truly performed such voyages as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners."

Does this not suggest the theory that the contract of affreightment between shipper and shipowner is to some extent at least independent and separate from the obligation of the vessel to perform the act of transportation after a cargo is loaded. In the cases cited here the contract made specific reference to both the *S. L. Watson* and the *Thomas P. Sheldon* as being obligated to carry the cargo, and yet the court says that "*the vessels never entered into any contract either expressly or by implication.*" The obligation of the vessel arises only upon the loading of cargo, or upon undertaking the act of transportation, but this undertaking may be varied, depending upon each case. As in the case of the *Oceano*, 148 Fed. 131, relied upon so strongly by petitioner, the master receipted for the advances on the bills of lading, and therefore undertook as a part of the very act of transportation to deduct these advances from the freight collected at destination. This he failed to do. Therefore

it was a breach of the undertaking of the vessel itself. The obligation was made a part of the act of transportation by endorsement of the master on the bill of lading and his undertaking to deduct the advances.

The frequently stated doctrine that the ship is bound to the cargo, and the cargo to the ship, and that a maritime lien must be mutual and reciprocal, is a mere formula for arriving at the result in each case. It illustrates the fact that the undertaking of the ship to perform the act of transportation is a separate obligation. This undertaking is usually set forth in a bill of lading which defines the respective obligations of the parties. These obligations as set forth then become the act of transportation to the performance of which the vessel is hypotheticated.

In *The Thomas P. Sheldon*, supra, the court aptly said:

> "It seems very clear from these authorities that the contract itself creates no lien and that the lien which is created by the law is mutual and reciprocal. The parties to this contract undoubtedly had mutual and reciprocal rights of lien during the carriage of the first cargo, *but the lien of the ship on the cargo was discharged by the payment of freight and by delivery to the consignee.* The contention that the lien in rem now exists cannot be based upon the principle that the ship is pledged to the cargo and the cargo to the ship, and if there is a lien it is unalateral and not mutual and reciprocal. * * * The lien of the cargo owner upon the ship must therefore be limited by the corresponding and reciprocal rights of the shipowner upon the cargo." (Italics ours).

Even though the contract between the parties was not completed and called for additional voyages, the court said that the lien was "discharged by the payment of

freight and by delivery to the consignee." This is because the vessel had completed its undertaking.

This is because the vessel has completed its undertaking, not under the contract, but the act of transportation to the performance of which the vessel is hypothecated.

Considering next the language of the circuit court in the *S. L. Watson*, 118 Fed. 945 (C. C. A. 2), which was quoted and approved by this court in *O. S. K. v. Pacific Export Lumber Company*, 260 U. S. 490, where the court said:

> "The rule of admiralty as always stated is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise, disregard the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for but not actually put aboard. *The Kiersage*, 2 Curt. 421, Fed. Case. No. 7762; *Pars. Ship. & Adm.* (1869) 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*, 2 Curt. 424, Fed. Case No. 7762, that admiralty liens are stricti juris and that they cannot be extended argumentatively or by analogy or inference. He says: 'they must be given by the law itself and the case must be found described in the law.' "

The court also said:

> "As to the latter proposition we may well add

> that while so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessel being inanimate could not by the very nature of things enter into a strictly executory contract. *Each of them could be subjected to such duties only as might arise by implication of law from the circumstances of a voyage or other concrete act on which it had in fact entered and* therefore as to them each of the several voyages was logically independent and single." (Italics ours).

These statements of the court are clear that the right of lien being a privilege and secret must be connected with some visible occurrence related to the ship or cargo or must be connected with the obligation of the ship itself in respect to the act of transportation which arises by implication of law and is not necessarily extended to all obligations of the contract of affreightment. These liens are of strict right and are not to be extended to situations not well defined in the law. The conclusion therefore is patent that the mere fact that the provision for a rebate on contingency in the present case is contained in the contract does not give rise to a maritime lien to recover the rebate when it is not alleged that the ship wrongfully exacted the higher rate, or that the allowance of the rebate was related to the Act of Transportation. No facts appear from which it can be inferred that the agreement for an allowance of rebate was part of the act of transportation. If the lien is not to be extended because it is secret and operates to the prejudice of innocent parties dealing with the vessel, there is here a case where not even the owner at the time of receiving payment is alleged to have knowledge of the facts upon

which the petitioner now claims recovery; nor was there a visible occurrence relating to the ship and cargo. All parties considered the transportation performed and terminated by payment and delivery. As in *Israel v. Moore & McCormick*, 295 Fed. 919, it cannot now be said that discovery of a mistake in making overpayment can be asserted by maritime lien. The action is for money had and received. The respondent has received money to which it is alleged it is not now entitled. And why? Because another intercoastal carrier carried at a lower rate, not because the vessel failed in any respect in its obligation to the cargo. The case seems clear.

The Saturnus, 250 Fed. 407 (C. C. A. 2):

In this case the court expresses the same thought we are attempting to convey herein when it was said at page 414 of the decision:

> "In respect of carriage of goods in particular, every public benefit has for centuries been deemed obtained when goods were liable for freight and the ship for safe and sound delivery of goods the mutuality of relations thus growing out of the act of transport, not the making of a contract for transportation. Anything more than this multiplies secret liens and hampers instead of advances ease and freedom of commerce."

B. *The relevant consideration to determine whether a breach of the Act of Transport is involved is the facts upon which petitioners claim is based. (What is the proof necessary to sustain the action?)*

Home Ins. Co. v. Merchants Transportation Co., 16 Fed. (2) 372 (C. C. A. 9):

While the action in this case was one in admiralty in

personam and admiralty jurisdiction was denied altogether, the case lends support to the case at hand.

The suit was one to recover back from the respondent certain insurance money paid by libelant to respondent on a policy of marine insurance. The claim was that payment was made in reliance on misrepresentation and fraud of the assured. The claim to admiralty jurisdiction was based upon the fact that the action involved a policy of marine insurance and the construction of the same. In denying admiralty jurisdiction, the court said:

> "Here the action is not merely an action on a maritime contract or tort nor a suit to enforce liability under the covenants of policies of marine insurance. It is an action growing out of certain alleged inequitable acts of the appellee and primarily its purpose is to recover money obtained by means of fraud and false representations. In such a case in an action for damages as for tort, it is sufficient to entitle the plaintiff to recover if he has so far relied upon the false representations of the insured that but for such representations the payment would not have been made. *Hartford Ins. Co. v. Matthews*, 102 Mass. 221. Money so paid may also be recovered in an action as for money had and received."

This language can be transposed to fit the present case. The action here is not one upon a contract of affreightment or tort, but is a suit arising by reason of the act of a third party and to recover money paid by mistake of facts. The money so paid could be recovered in an action as for money had and received.

The further language of the court is material to the present question:

> "In either form of action the first question for determination is whether or not the appellee im-

posed upon the appellant by false proof of loss and the appellant, in ignorance of the fraud, paid the money upon the policy."

Applying this statement to the case at bar, it would read: (Quotes are ours).

> "The first question for determination is whether or not the Luckenback Steamship Company carried similar cargo, as alleged, at the rate of $8.50 per M feet, and that the libelant in ignorance of this fact paid freight at the rate of $10.00 per M feet.",

United Transportation & Lighterage Co. v. N. Y. & Baltimore Transportation Line, 185 F. 386 (C. C. A. 2): This was a cross libel to recover excessive charges for lighterage services rendered under a written contract. The contention was one Groves, who made the contract, was at the same time an officer and director of both companies, and that the contract was fraudulent. The libel was in personam.

The court held that the action was not within admiralty jurisdiction:

> "The admiralty grants relief legal in its nature when and only when the subject matter of the suit is maritime. Admiralty has jurisdiction over maritime contracts but it has none over contracts leading up to the execution of maritime contracts, and upon similar principles it can have no jurisdiction over nonmaritime transactions following the execution of maritime contracts.
>
> * * *
>
> "The maritime contract was the one which respondent says was fraudulent. It does not seek to enforce but to avoid that. It cannot, however, have such contract set aside without invoking the equitable relief which a court of admiralty cannot grant. Moreover, even from this point of view the matter

is not maritime. *The fundamental question is whether the general manager of respondent, induced by his interest in libelant corporation, betrayed his trust, but this question is not maritime in its nature.*"

There are two important points in this decision applicable to the present case. There the overpayment was alleged to be due to fraud. In our present case the overpayment was due to mistake. In both cases payment was in connection with a maritime service. Also, in the cited case the fundamental question was whether Groves, induced by his interest in the corporation, betrayed his trust. This had nothing to do with the act of transportation and obligation of the vessel engaged therein. In our present case the fundamental question is whether the Luckenback Steamship Company carried similar cargo at a lower rate. This question also has no relation to the act of transportation or the obligation of the respondent steamship PACIFIC CEDAR in performing its undertaking.

Following the case of *United Transportation & Lighterage Co. v. N. Y. & Baltimore Transportation Line*, supra, is the case of *Israel v. Moore & McCormick*, 295 F. 919 (D. C. N. Y.):

In this case libelant shipped coffee from Rio to New York. En route part of the coffee was jettisoned and upon arrival libelant, in ignorance of the fact that part had been jettisoned, paid the full amount of freight. The libel was for recovery of freight paid upon the cargo jettisoned. The court held that the action was not cognizable in admiralty but was an action for money had and received:

"Therefore when a question arises of the jurisdiction of the admiralty over such an obligation the

relevant consideration should be those facts from which the law raises the obligation, not the mere form of the remedy or the fictitious promise.

" * * *

"In the case at bar the reason why the respondent ought not to keep the money is that he has not performed the contract of affreightment. He has been paid for something which he did not do. * * *. The question of the maritime nature of the obligation depends upon whether it makes a difference that it was a maritime service which he failed to perform."

Illustration of the fact that the court had in mind the distinction contended for in the case at bar, whether this case was rightly decided or not, is found in the language of the court distinguishing the case of *The Oceano*, 148 F. 131 (D. C. S. D. N. Y.):

In *The Oceano:*

" * * * the ship had agreed to deduct from the freight all disbursements paid by the charterer who mistakenly overpaid here. *The right of recovery rested upon the ship's unfilled promise.*" (*Israel v. Moore & McCormick*, 295 F. 919). (Italic ours).

The Oceano, 148 F. 131 (D. C. S. D. N. Y.):

In reviewing petitioner's brief filed herein, it appears that great emphasis is placed on the *The Oceano* as authority for the existence of a maritime lien in the present case. Respondent is willing to take issue with petitioner upon *The Oceano* and now answers petitioner's brief, pages 24, 25, 26 and 27, as a further illustration of the distinction in the cases cited by petitioner.

These facts, in *The Oceano*, supra, are material to the distinction: (1) the amount of the advances was endorsed upon the bills of lading by the master; (2) by some

unexplained error the master upon arrival deducted £300 less than he should have deducted from the freight; (3) "this erroneous settlement was reduced to writing and signed by the same master who had receipted for the actual advance"; (4) the agreement to repay the the charterer the full amount of the advances was in this case a part of the act of transportation; (5) the master of the vessel did a wrongful act in failing to deduct all of the advances, which was known to him, he having signed the original bills of lading and receipted for the advances.

The court places this decision on the basis of a deliberate refusal of the master "to pay an advance of freight." To this extent the vessel breached an obligation undertaken and part of the act of transportation. The obligation was to safely carry the cargo to destination and to repay the advance of freight. On this theory the case is correctly decided and distinguishable from the case at bar.

While distinguishable on the facts, it is to be noted that the language of the court is too broad and not a correct statement of the law. We refer to the following quotation:

> "As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charter and a suit in rem may be maintained for any liability of the master or owner arising therefrom."

Insofar as the liability of the owner is concerned this statement is error. The lien arises only from some breach of the ship or its master in connection with the act of transportation. To illustrate, suppose a contract of affreightment under which a cargo was carried and delivered provided that upon the shipper paying the

freight therein upon delivery at destination the owner would build a house for the shipper. The owner received the freight and thereafter refused to build the house. Could it be said that an action for damages for failure to build the house (or perform any other acts) would support a claim of maritime lien on the vessel merely because there was a breach of the contract of affreightment. Or suppose the undertaking of the owner under the affreightment contract was to carry a return cargo for the same shipper free of charge, and the owner refuse to allow the cargo to be loaded and carried on the return voyage. This breach of the contract would certainly give no lien upon the vessel.

We reiterate that the basis of the action must be a fault or breach chargeable to the ship or its master in relation to the act of transportation concerning which the reciprocal rights exist in order for a lien to attach.

The reason why admiralty had no jurisdiction in *Israel v. Moore & McCormick*, supra, also supports the reason why no maritime lien exists in the present case. The illustration is one of the nature of the action and whether it involved the obligation of the vessel in respect to the act of transportation.

C. *A maritime contract may contain separable non-maritime elements not enforceable in admiralty, and not part of the Act of Transport.*

In respondent's brief in opposition to the petition for a writ of certiorari in this case, cases are cited (page 13) to support respondent's further contention that the claim for a rebate on alternate rate as stated in the contract is an independent clause and may be separably enforced.

While this position was originally urged on the point that admiralty had no jurisdiction at all, which position was sustained by the District Court and reversed by the Circuit Court of Appeals, it nevertheless has a direct bearing upon the question of in rem jurisdiction.

If the claim for rebate in this case is separable and can be separably enforced, such fact lends further support to respondent's contention that petitioner's present claim is not one arising out of the act of transport by the respondent vessel PACIFIC CEDAR. The law being settled that no lien arises in respect to any claim whether arising under a contract of affreightment or not unless it also arises out of the act of transport, the question of whether this claim asserted by petitioner arises out of the act of transport becomes material. It does not so arise if it is separable and can be separably enforced independent of the act of transport.

The libel in this case does not allege that at the time freight was paid by petitioner upon delivery that any other rate than $10.00 per M feet was known by the parties or ascertainable by them. Therefore, the clause (R. 9) providing for a lower rate on contingency could only be effective as a rebate clause entitling petitioner to recover back part of the freight paid, which at the time paid was intended and supposed by both parties to be the rate applicable to the shipment. It would be an impossible construction to hold that the rate applicable to the shipment was never fixed and remained in suspense depending upon what third parties might do whether known or not. That this intention and construction is the one placed upon the entire transaction by the libelant

is borne out by the fact that libelant does not allege in the libel that the freight was unlawfully or wrongfully collected or that libelant was compelled under protest to pay freight in excess of the contract rate. The libel is clear in alleging that the libelant is entitled to recover back part of the freight paid because of the happening of a contingency the existence of which was unknown to both parties at the time of payment. This, then, is a claim for rebate and is entirely separable and not a part of nor arising out of the act of transport to the performance of which the vessel is hypotheticated.

Taylor v. Weir, 110 Fed. 1005 (D. C. Ore.): In this case the charter party which was executed contained an agreement for the payment of commissions. The commissions were not paid and libel in personam was brought. In holding that admiralty had no jurisdiction, the court said:

> "The fact that the agreement for commissions constitutes a clause in the charter party does not make it a maritime contract. The question of jurisdiction does not depend upon the form of the contract but the substance of the undertaking."

This case was later affirmed by Circuit Court of Appeals for the Fifth Circuit in the case of *Brown v. West Hartlepool Steam Navigation Co.*, 112 Fed. 1018, involving also a commission agreement contained in a charter party. In holding that admiralty had no jurisdiction, the court said:

> "The District Court held that this stipulation is not a maritime obligation or contract enforceable in admiralty and we concur. See *Taylor v. Weir* (D. C. Ore.), 110 Fed. 1005, and cases there cited."

Pillsbury Flour Mills Co. v. Interlake Steamship Co, 40 Fed. 2nd, 439 (C. C. A. 2):

This case, by the Circuit Court of Appeals for the Second Circuit, involves a cargo of grain shipped from Milwaukee to Buffalo. The bills of lading provided for carriage and for winter storage. The vessel arrived in Buffalo and anchored "there to store her cargo of wheat for the winter months." There was no report of damage to cargo upon arrival. The following spring the cargo was discharged in a damaged condition. The court held:

> "These bills of lading embody a dual contract; one for transportation and the other for storage, and a breach of that contractual obligation which is non-maritime may not be the subject of a suit in admiralty." See also *The Richard Winslow*, 71 Fed. 426; *The Pulaski*, 33 Fed. 383; *Keyser v. Blue Star Steamship Co.*, 91 Fed. 267.

Compagnie Francaise de Navigation a Vapeur v. Bonnasse, 19 Fed. 2nd, 777 (C. C. A. 2):

In this case the owner, after damage to the vessel constituting a general average loss, procured a general average bond in favor of the charterer. Another bank thereafter took over the assets of the bank issuing the bond and assumed payment of all its banking liabilities. The suit was against the second bank upon the general average bond. The court held that the action could be maintained in admiralty even though the contract was both maritime and non-maritime. This was so because the maritime obligations of the contract could be separately adjudicated. The court said:

> "The mere fact that the contract covers a subject matter of both kinds is not, therefore, decisive. That would make the mere form control. The sub-

stantial question is whether the maritime obligation can be separately enforced without prejudice to the rest."

D. *Petitioners Authorities.*

Further discussion of authorities will be only cumulative; however, respondent wishes to point out the distinction existing in several cases cited and relied upon by petitioner.

In *The Emelia S. DePerez*, 22 Fed. 2d. 585 (D. C. Md.), the action was one by a shipper to recover the vessel's portion of general average contribution. A libel in rem was sustained. This decision, however, was based upon the distinct theory that the libelant was suing the ship for its contribution in general average. The court said:

> "So if any one or more cargo owners liens when asserted against the vessel for the latter's share completely exhaust such share, the vessel cannot be further libeled."

In *Tatsumma K. K. K. v. Robert Dollar Company*, 31 Fed. 2nd 401 (C. C. A. 9), additional freight was demanded by the vessel as a condition precedent to delivery and was paid under protest. The freight had been prepaid. The right of respondent to retain the additional freight rested upon an interpretation of the bill of lading. Nothing was said by the court in this case concerning the question of in rem jurisdiction.

In *The Captain Faure*, 10 Fed. 2d 950 (C. C. A. 2), the libel was in rem for damages for failure of the vessel to sail after the cargo had been loaded aboard and bills of lading signed by the master. This was an especially plain breach of the act of transportation in failing to carry the cargo at all.

In *The Ada*, 233 Fed. 325 (D. C. Md.), the libel was to recover additional freight demanded on arrival as a condition precedent to delivery. The additional freight was paid under protest. The libel in rem was sustained. Here, too, was a wrongful act of the vessel occurring during the transportation. It is also significant that no question of in rem jurisdiction was raised in this case.

In *The Fredensbro*, 18 Fed. 2d 983 (D. C. Pa.), the libel in rem was to recover freight paid. After loading cargo the ship was in collision with another vessel and sank. The failure to carry the cargo was a fault which gave rise to the right of maritime lien.

The *Henry W. Breyer*, 17 Fed. 2d 423 (D. C. Md.). Here various shippers loaded cargo and prepaid the freight. The vessel did not sail because of financial difficulty and cargo was later reloaded on another vessel and carried to destination. The court also had before it the question of foreclosure of a preferred mortgage and whether the liens of the shippers were prior to the right of the preferred mortgagee. This depended upon whether the shipper's liens constituted tort claims. The court finds that the shipper's liens were tort claims in that the vessel failed to carry the cargo as agreed after having loading the same and issued bills of lading therefor. While this was breach of contract, it was also a claim in tort and allowed as such.

The *John Francis*, 184 Fed. 746 (D. C. Ala.). This case quite adequately illustrates the distinction existing in the cases. The action by proceeding in rem was to recover charges made against the cargo for demurrage. These charges were paid under protest. The court said:

"I find that the payments made and complained of were made under protest. Moreover they were exacted by the master as a condition on which he would deliver the cargo."

The three cases cited by petitioner in its brief on petition for certiorari, decided by this court, are not in any respect in point. Reference is made to the following:

Allanwilde Transportation Co. v. Vacuum Oil Co., 248 U. S. 337; 63 L. Ed. 312 (1919).

International Paper Company v. Gracie D. Chambers, 248 U. S. 387; 63 L. Ed. 318 (1919).

B. L. Harriman v. Emerick, 76 U. S. 161, 19 L. Ed. 629 (1870).

In the first two cases no question of in rem jurisdiction was raised, nor could have been as the actions were based upon an alleged cause for the recovery of freight paid, the vessels having loaded cargo and having failed to deliver the same at destination. There was a distinct failure on the part of the ship in the act of transportation in both cases. In the *Harriman* case no question of in rem jurisdiction was raised, but the facts showed a distinct breach and fault on the part of the vessel in failing to deliver cargo as undertaken. The ship did not perform the act of transportation. None of these cases are inconsistent with, but rather support the contention of respondent in this present case.

In *The Oregon*, 55 Fed. 666 (C. C. A. 6 (1893), most strongly relied upon by petitioner, the question of in rem jurisdiction was not raised. It is true that the court held the libelant's right to recovery as to the $104 collected by the master of the *Palms* was incidental to the

maritime contract and therefore fully within the admiralty jurisdiction.

This case can be distinguished on the ground that the master of the *Palms* collected $104 more from a consignee of the libelant than the agreed freight set forth in the charter under which the cargo was carried. In this respect the action of the master was wrongful. Had the point been raised in *The Oregon*, it is doubtful whether Justice Taft would have reached the conclusion that a maritime lien existed in favor of the libelant for recovery of the item of $104. This feature of the case was very incidental to the main question at issue and was undoubtedly overlooked. We cannot feel that the case is correctly decided on this point. It may be that the facts are not fully set forth in the opinion and that the master in fact had knowledge of and was bound by the charter in the collection of freight and undertook to collect the $104 for the charterer and to pay the same to the charterer. If such were the facts his failure in this respect would constitute a fault or breach occurring in respect to the act of transportation.

That petitioner entirely misunderstands respondent's position is evidenced by its supplemental brief. No contention is made by respondent that a maritime lien does not exist for freight, the inquiry being, however, upon what facts does the claim for freight, or return of freight, rest. What is the basis of the claim. If it be that the vessel committed fault in respect to the act of transportation, a lien will lie; if it be that the owner or ship failed in some respect not connected with the act of transport, there is no foundation for a lien. Again, peti-

tioner seeks to narrow respondent's position to that of a claim that the lien is limited to the physical obligations of the vessel. Respondent's position is not so narrow. A breach of any obligation undertaken by the vessel gives rise to the lien. In this respect many obligations may be contained in a contract of affreightment for the performance of which the vessel is not hypothecated.

The Saturnus, 250 Fed. 407, 409 (C. C. A. 2):

> "Is a maritime lien upon hull or cargo as the case may be the normal and lawful result of every claim of damage due to any violation of the terms, express or implied, of a contract for carriage under which a carriage is ever actually begun. The inquiry must go this far, because no reason can be given for upholding the presently asserted lien that will not also support a multitude of other demands quite as close to the act of transport as is the one at bar, and all of them breaches of the maritime contract of affreightment."

The inquiry here is the same. Assuming libelant's claim to be a valid claim for damages due to a violation of the express terms of the contract of carriage, still the inquiry must be does the claim arise out of the act of transportation to the performance of which the vessel is hypothecated. The decisions having announced that the act of transportation begins when the cargo is loaded, requires proper care and handling and delivery at destination and as said in the *G. A. Tomlinson*, 279 Fed. 786, the place designated in the bill of lading. The question now, therefore, is whether the claim of libelant can be said to arise out of the act of transport. Had not the Luckenback Steamship Company carried cargo at a lower rate, there would be no claim and *a fortiorari*, the act of the

Luckenback Steamship Company is the factor giving life and right to a claim, without which no claim would exist. Therefore, under no theory can it be said that the claim here arises out of the act of transportation undertaken by the respondent steamship PACIFIC CEDAR. Payment of freight was made and received voluntarily and at the rate specified. The most that can be said for libelant's position is that payment was voluntarily made by mistake of fact. In no sense was a fault committed in respect to these matters by the vessel and no lien exists by reason thereof.

CONCLUSION

No maritime lien exists upon a vessel for breach of any contract of carriage unless it arises out of the act of transport to the performance of which the vessel is hypothecated. This is so because maritime liens are mutual and reciprocal and arise only in connection with some visible occurrence relating to the ship or cargo. Such liens are stricti juris and cannot be extended argumentatively. The act of transport extends only to a right delivery of cargo by the vessel and the payment of freight by the shipper or consignee, upon the fulfillment of which reciprocal rights terminate.

In this case all matters having relation to the act of transport were performed by the vessel. Freight was paid according to the rate stated in the contract. The parties had no knowledge of any facts which would alter the stated rate of $10.00 per M feet. The payment was voluntary. The happening of a contingency that another intercoastal carrier carried for $8.50 per M feet gave life

to the right for a rebate. No act of the vessel or its owner was involved. The right to rebate of part of the freight is separable and can be separably enforced. The right to rebate being separable and no part of the act of transport, is not an obligation of the vessel in its relation to the cargo. No lien exists for the enforcement of the rebate now claimed by petitioner. Petitioner's action is one in the nature of "for money had and received."

Respondent requests that the decree of the Circuit Court of Appeals for the Ninth Circuit be affirmed.

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